CAPITAL INSURANCE BHD

v

B S SIDHU

COURT OF APPEAL, KUALA LUMPUR
DATO' NH CHAN JCA
DATO' ABU MANSOR ALI JCA
DATO' ABDUL MALEK AHMAD JCA
[APPLICATION NO: W-08-534-1995]
22 DECEMBER 1995

CIVIL PROCEDURE: *Committal proceedings – Disobeying an order of Court – Whether there could be contempt when the order of Court had not been served – Rules relating to service of an order of Court – Whether required strict compliance – Respondent was in Court when order pronounced – Whether of any consequence – Rules of the High Court 1980 O. 45 rr. 5(1), 7.*

This was a notice of motion wherein the applicant prayed that the respondent be committed to prison for disobeying an order of Court. The facts were that on 25 July 1995, the respondent, while appearing in Court as Counsel for the respondent in Civil Appeal No. 02-155-1995, was ordered to refund forthwith some RM730,859.71 to the applicant (i.e the appellant therein). Following the Court order, the applicant's Counsel wrote two letters calling for the sum, but somehow, had not served the respondent the relevant Court order. The respondent did not comply with the written demands, but nevertheless paid out the money one day after the Court order was served on him on 13 October 1995. Before the learned Judges, the applicant alleged that the respondent had wilfully disobeyed the Court order and was in contempt in not refunding the sum when the written demands were made or much earlier than 13 October 1995.

Held:

Per Abu Mansor Ali JCA (delivering the judgment of the Court):

[1] The enforcement of contempt proceedings, being a matter affecting liberty of a subject, must strictly comply with the rules that require the order of Court to be served on the respondent.

[2] Although the respondent was present and heard the order directing him to refund the money deposited, nonetheless the respondent is required by the Rules of the High Court 1980 to be served with the order personally before he could be said to have wilfully disobeyed the order. Here, it was common ground that the said order was not served during the period the respondent was alleged to have disobeyed. In any case, the respondent

had paid the sum after service of the order, and the respondent, therefore, had not committed any contempt.

[Motion dismissed]

PROSEDUR SIVIL: *Prosiding komital – Mengingkari perintah Mahkamah – Samada berlakunya penghinaan bilamana perintah Mahkamah telah tidak disampaikan – Kaedah-kaedah berhubung dengan penyampaian perintah Mahkamah – Samada memerlukan pematuhan yang tegas – Responden berada di Mahkamah ketika perintah diumumkan – Samada penting – Kaedah-kaedah Mahkamah Tinggi 1980, A. 45 kk. 5(1), 7.*

Ini adalah notis usul dalam mana pemohon telah memohon supaya responden dihukum ke penjara kerana mengingkari perintah Mahkamah. Fakta-faktanya adalah bahawa pada 25 Julai 1995, responden, ketika hadir di Mahkamah sebagai Peguam bagi pihak responden dalam Rayuan Sivil No. 02-155-1995, telah diperintahkan supaya membayar balik dengan segera RM730,859.71 kepada pemohon (iaitu perayu di situ). Berikutan perintah Mahkamah tersebut, Peguam pemohon menulis dua pucuk surat menuntut jumlah tersebut, tetapi walaubagaimanapun, telah tidak menyampaikannya kepada responden perintah Mahkamah yang relevan itu. Responden telah tidak mematuhi tuntutan-tuntutan bertulis tersebut, tetapi namun begitu, telah membayar wang tersebut satu hari selepas perintah Mahkamah disampaikan kepadanya pada 13 Oktober 1995. Di hadapan Hakim-Hakim yang bijaksana, pemohon mendakwa bahawa responden telah dengan sengaja mengingkari perintah Mahkamah dan telah melakukan penghinaan kerana tidak mengembalikan jumlah berkenaan ketika tuntutan-tuntutan bertulis dibuat ataupun jauh sebelum 13 Oktober 1995.

Diputuskan:

Oleh Abu Mansor Ali HMR (menyampaikan penghakiman Mahkamah):

[1] Penguatkuasaan prosiding penghinaan, yang merupakan suatu perkara yang menjejaskan kebebasan seseorang, mestilah dengan tegasnya mematuhi peraturan-peraturan yang memerlukan perintah Mahkamah tersebut disampaikan ke atas responden.

[2] Walaupun responden hadir dan mendengar perintah yang mengarahnya untuk membayar balik wang yang telah didepositkan, namun, responden adalah dikehendaki oleh Kaedah-kaedah Mahkamah Tinggi 1980 untuk disampaikan dengan perintah tersebut secara penyampaian ke diri sebelum ianya boleh diperkatakan telah sengaja mengingkari perintah tersebut. Dalam hal di sini, kenyataannya ialah perintah tersebut telah tidak disampaikan dalam tempoh di mana responden didakwa sebagai telah mengingkarinya. Dalam apa keadaan sekalipun, responden telah membayar wang berkenaan

selepas penyampaian perintah tersebut, dan responden dengan itu telah tidak melakukan apa-apa penghinaan.

[Usul ditolak]

Cases referred to:
Gordon v. Gordon [1946] 1 All ER 247 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 14, O. 45 rr. 5(1), 7

For the applicant - Manjit Singh (B. Balakumar with him); M/s. Azim Ong & Krishnan
For the respondent - Yusuf Khan Ghows Khan (Terrance Marbeck & Sharon Sidhu with him); M/s. Yusuf Lee Pathma & Marbeck

JUDGMENT

Abu Mansor Ali JCA:

This is a Notice of Motion (encl. 11A) of the applicant dated 2 November 1995 praying for an order that En. B.S. Sidhu, the respondent herein (this Motion) be committed to prison for disobeying the order of this Court given on 25 July 1995 directing En. Sidhu who was representing the respondent in the appeal before that Court to forthwith refund all the monies which had been paid by the solicitors for the appellant on account of the fact that the appellant had succeeded in his appeal and that he was allowed to defend his case unconditionally. After hearing arguments, we, dismissed this Motion with costs and we now give our reasons.

It may be necessary to mention that, before we proceeded with this Motion, we had dealt summarily with a separate Motion (encl. 11B) filed by En. Sidhu, the respondent in this Motion, praying for an order that the *ex parte* order granting leave to issue this Motion for committal be set aside. At our instance En. Yusuf Khan for En. Sidhu was told by us that we would not be able to entertain his application as the order for leave was obtained on an *ex parte* application. En. Yusuf Khan did not insist on proceeding with his application to set aside the *ex parte* order granting leave to the applicant to apply for the committal of En. B S Sidhu and we dismissed his application.

We then proceeded to hear the applicant's main Motion.

En. Manjit Singh for the applicant took us through the facts of this case as appeared in the affidavit of Mohd. Khalid bin Abu Hassan, pengurus besar of the applicant. He referred us to Mahkamah Rayuan Civil No.02-155-1995 which arose from the decision of the High Court Shah Alam, Selangor in Guaman Serial No. 23-91-1994 (said suit) giving summary judgment under O. 14 of the High Court Rules, 1980 against the appellant on 9 February 1995. What is necessary for us to mention, as stated above in this appeal, before this Court on 25 July 1995 was that the Court allowed the appellant's appeal and made the order already referred to above.

En. Manjit Singh contended that following that order dated 25 July 1995, he applied for the return of the sum ordered amounting to RM730,859.71, the sum which was deposited by the applicant's Counsel into the account of the respondent. Counsel said that he eventually had to write two letters, one was on 25 July 1995 and again on 31 July 1995 calling for the return of that sum. He submitted that the respondent herein wilfully refused or neglected to refund the sum ordered. Counsel conceded that the Appeal Court's order of 25 July 1995 was not served on the respondent but the applicant's Counsel contended that it was not necessary for the applicant's Counsel to have done that because Encik Sidhu himself was present in Court representing the respondent in that appeal and was well aware of what this Court's order was. He is an officer of the Court and it was his duty to have obeyed the Court's clear order. He prayed for the order asked for.

En. Yusuf Khan in reply said there was no deliberate refusal by the respondent to comply with the order of the Court. There was also absence of any delay. In fact the sum was paid to the applicant's Counsel as per the terms of the order within 24 hours of the service of that order which took place on 13 October 1995 at 4.05 p.m., and the sum was in fact paid on 14 October 1995 at 12.35 p.m., a fact not disputed by the applicant.

As stated by En. Manjit at the commencement of his application, there was only one issue to be settled by this Court. His complaint was the respondent's alleged disobedience to the order to pay from 25 July 1995 to 14 October 1995 despite the two letters requesting payment and the term 'forthwith' in the order meant, by way of definition, without delay, or immediately. He submitted that a delay of more than 2 months from 25 July 1995 to 14 October 1995 was unreasonable.

It was common ground that the said order was not served during the period the respondent was alleged to have disobeyed. En. Yusuf Khan contended that it was not that the respondent had disobeyed the order but the truth was that the order was not served on him. Was it necessary to have the order served inspite of the fact that the respondent was present in Court and heard the Court pronounce the order? The respondent's Counsel referred us to O. 45 r. 5(l) and r. 7:

> 5. (1) Where
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> (a) a person required by a judgment or order to do an act within a time specified in the judgment or order refuses or neglects to do it within that time or, as the case may be, within that time as extended or abridged under O. 3, r. 5; or
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> (b) a person disobeys a judgment or order requiring him to abstain from doing an act,

then, subject to the provisions of these rules, the judgment or order may be enforced by one or more of the following means, that is to say

(i) with the leave of the Court, an order of committal;

(ii) where that person is a body corporate, with the leave of the Court, an order of committal against any director or other officer of the body.

(iii) subject to the provisions of the Debtors Act, 1957, an order of committal against that person or, where that person is a body corporate, against any such officer.

(2) Where a judgment or order requires a person to do an act within a time therein specified and an order is subsequently made under r. 6 requiring the act to be done within some other time, references in para. (1) of this rule to a judgment or order shall be construed as references to the order made under r. 6.

And then the relevant O. 45 r. 7 reads:

7. (l) In this rule references to an order shall be construed as including references to a judgment.

(2) Subject to O. 24, r. 16(3), O. 26, r. 7 (3), and paras (6) and (7) of this rule, an order shall not be enforced under r. 5 unless

(a) a copy of the order has been served personally on the person required to do or abstain from doing the act in question; and

(b) in the case of an order requiring a person to do an act, the copy has been so served before the expiration of the time within which he was required to do the act.

We were unanimous in our view that although the respondent was present and heard the order directing him to refund the money deposited, nonetheless the respondent is required by the Rules of the High Court 1980 to be served with the order personally before he could be said to have wilfully disobeyed the order. We were fortified in our view by the case of *Gordon v. Gordon* [1946] 1 All ER 247, a case cited by the respondent's Counsel, where the appellant therein was the husband of the respondent in a case involving the custody of a child. The tussle between them resulted in the custody of the child to the marriage made in favour of the respondent wife with reasonable access to the appellant. While this was current and the child was with the appellant husband he applied to rescind the custody order and on 19 December 1945 the appellant husband, having acted in defiance, was ordered to hand over the child to the respondent by 20 December 1945 the term of which was the appellant was ordered to hand over the child to the respondent by **or before 7 p.m. on 21 December 1945**, but there was a delay and the copy of the order, however, came to be served on the appellant only at 8 p.m. It was contended by the appellant in a summons for non-compliance that

the order made on 21 December 1945 was bad on the ground that it was served after the time for compliance has expired. It was contended by the respondent that there was no necessity for the service of the order because:

(a) the appellant was evading service;

(b) the Court had inherent jurisdiction to commit a person for contempt.

It was held:

Held: (i) since orders for committal and attachment affected the liberty of the subject, proceedings for contempt by disobedience of an order to do something outside the Court could only be enforced if the rules relating to the process of committal or attachment had been strictly complied with;

(ii) on the facts, the service of the order in due time was necessary for the purpose of founding proceedings in contempt, the Court having the power to dispense with the formal requirements of the rule.

As we have stated, we were unanimous in that we find merit in the argument of Counsel for the respondent that contempt proceedings being a matter affecting the liberty of a subject, before it can be enforced there must be strict compliance with the rules that require that the order of the Court be served on the respondent. And we make no distinction that he was then counsel and present hearing the order. If he had been served with a sealed copy of the order according to the rules and had disobeyed, then we can say in law it is contempt. Since he had duly paid after service of the order, we say he had not committed any contempt. We hereby dismiss the Motion with costs.

Reported by W.A Sharif